

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DEBORAH R. NOLAN,)	
)	3:10-cv-01571-HU
Plaintiff,)	
)	
vs.)	OPINION AND
)	ORDER
TRANSCEND SERVICES, INC., a)	
Delaware Corporation,)	
)	
Defendant.)	

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Attorney for Plaintiff

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HUBEL, Magistrate Judge:

Opinion and Order

Pursuant to Federal Rule of Civil Procedure ("Rule") 56(c),
defendant Transcend Services, Inc. ("Defendant") moves for summary
judgment as to all of plaintiff Deborah R. Nolan's ("Plaintiff")

OPINION AND ORDER

1 claims.¹ The parties have given full consent to adjudication of
2 the case by a magistrate judge pursuant to 28 U.S.C. § 636(c). For
3 the reasons set forth below, Defendant's motion [19] is GRANTED in
4 part and DENIED in part.

5 **Factual Background**

6 Defendant is a medical transcription company that provides
7 health care documentation to various clients, including clinics,
8 hospitals, and doctor's offices. (Nolan Dep. 36:1-7.) Medical
9 professionals send audio clips to Defendant in order to be
10 transcribed, and Defendant returns the completed transcription back
11 to the client. (Nolan Dep. 36:8-13.) Defendant's quality
12 assurance role is to ensure that the documentation sent back to
13 clients meets industry quality standards. (Nolan Dep. 36:14-19.)
14 According to Plaintiff, in terms of transcribing medical records,
15 there is nothing more important than the quality and accuracy.
16 (Nolan Dep. 36:20-22, 38:6-9.)

17 Defendant employs Medical Language Specialists ("MLS"), who
18 are responsible for providing medical transcription and medical
19 text editing services. (Def.'s Mem. Supp. Mot. Summ. J. ("Def.'s
20 Mem.") at 2.) "All MLS's must pass [Defendant]'s testing
21 procedures, and recently hired MLS's are subject to a 100% review
22 and quality assurance audit, meaning that the MLS's must
23 demonstrate the required proficiency for accuracy before being able
24 to send work directly to clients." (Def.'s Mem at 2; Nolan Dep.

25
26 ¹ Pursuant to Rule 56, Defendant also raises a series of
27 evidentiary objections regarding Plaintiff's declaration offered in
28 response to Defendant's motion for summary judgment. (Def.'s Reply
Supp. Mot. Summ. J. (Def.'s Reply") at 4-7.) These objections will
be addressed in conjunction with Defendant's motion.

69:3-70:9, 128:14-21, 68:24-69:2, 90:11-91:18.) Defendant's Quality Assurance Specialists ("QAS") are responsible for the final review of the MLS's transcription reports. (Def.'s Mem. at 2.) QAS's review dictation and proofread the transcription reports, filling in missing words or phrases when necessary. (Nolan Dep. 70:4-9.)

Within Defendant's corporate structure, Regional Operations Managers ("ROM") are responsible for direct oversight of MLS's and QAS's. (Def.'s Mem. at 3.) ROM's work with Defendant's Quality Assurance Manager ("QAM") to address quality issues regarding QAS's and MLS's. (Nolan Dep. 41:6-42:22; Fendall Decl. Ex. 2.) Defendant's QAM has "direct oversight and responsibility to ensure quality delivery per the Transcend quality policy and standard for the entire organization." (Fendall Decl. Ex. 2; Nolan Dep. 43:25-44:7.) The QAM provides support and guidance to QAS's by, amongst other things, conducting and coordinating "continuing education programs in quality for QA staff and MLS by webinar, conference calls, references, etc." (Fendall Decl. Ex. 2; Nolan Dep. 43:25-44:7.) The QAM develops and implements policies and procedures for quality delivery, maintains standards and processes for new MLS and QAS hires, and tracks production numbers and audits to ensure quality. (Nolan Dep. 81:5-82:16, 99:3-23, 109:7-111:23; Fendall Decl. Ex. 2.) The QAM is also responsible for assisting ROM's "with MLS quality issues" and "offering ideas for improvement." (Fendall Decl. Ex. 2; Nolan Dep. 41:16-42:8, 44:18-22.)

Prior to being employed by Defendant, Plaintiff worked for Transcription Relief Services, LCC ("TRS") as a Quality Assurance

1 Manager ("QAM") for approximately three years. (Nolan Dep.
 2 18:24-19:10.) Defendant purchased TRS on April 1, 2009, at which
 3 time Plaintiff became Defendant's QAM. (19:1-10. 26:11-16.)
 4 Shortly after acquiring TRS, Plaintiff was informed that she would
 5 be required to reapply for her position as QAM. (Nolan Dep.
 6 43:8-22.) Although Plaintiff continued performing her duties
 7 during the application process, she was not formally awarded the
 8 position until July 23, 2009.² (Nolan Dep. 43:8-44:11.) As
 9 Defendant's QAM, Plaintiff was paid an annual salary of \$41,976.00,
 10 and she was "eligible to participate" in Defendant's bonus plan,
 11 which was based on her "2009 [performance metric] and company
 12 performance." (Fendall Decl. Ex. 2) (emphasis added). Plaintiff
 13 served as Defendant's only QAM and reported directly to Defendant's
 14 Director of Quality Assurance.³ (Nolan Dep. 41:6-9, 46:8-16;
 15 Fendall Decl. Ex. 4 at 3.)

16 According to Plaintiff's Job Description, her "Essential Job
 17 Functions" were as follows:

- 18 ▶ Develops, implements and maintains methodologies
 19 and guidelines for quality processes to support the
 20 Transcend minimum required quality score, to meet
 21 or exceed industry average of 98.
- 22 ▶ Develops standards and requirements for new QA
 23 hires, including testing, to ensure competency.
- 24 ▶ Coordinates and administers required audit process
 25 --routine, random and focused-- as needed at
 26 prescribed intervals. Track and trend all related
 27 data for analysis and improvement.
- 28 ▶ Tracks and trends QA production numbers on regular

25 ² Plaintiff's official start date as Defendant's QAM was
 26 August 1, 2009. (Nolan Dep. 44:12-14.)

27 ³ Susan Lucci ("Lucci") served as Plaintiff's original
 28 supervisor until September 2009. (Nolan Decl. ¶ 11.) After Lucci
 resigned, Laurie Leiker ("Leiker") became Plaintiff's supervisor.
 (Nolan Decl. ¶ 11; Nolan Dep. 46:8-16.)

basis. Follows up with QA personnel who are not meeting production goals, working with and through the ROM.

- ▶ Tracks and trends regular QA staff audits to ensure quality competencies.
- ▶ Conducts/coordinates continuing education programs in quality for both QA staff and MLS alike by webinar, conference calls, references, etc.
- ▶ Self-education; communicates with QA staff and ROMs regarding conferences or symposia attended, new ideas and standards for [the] industry.
- ▶ Mentorship: Motivates and encourages QA staff and MLS in acquiring credentials (CMT/RMT), professional development.
- ▶ Assists in development of RFPs in conjunction with ROMs and sales staff to provide customers with complete information on Transcend quality processes.
- ▶ Assist ROMs with quality issues, offering ideas for improvement.
- ▶ Assist ROMs with customer quality issues, problem resolution; additional contact for HIM personnel; works with clients to establish dictation best practices for increased healthcare documentation quality.
- ▶ Editing, QA, and traditional transcription as necessary to ensure TAT.
- ▶ Lead the transition program of new graduates as implemented ensuring all data capture points are tracked for reporting.
- ▶ Special projects as directed.

(Fendall Decl. Ex. 5; Nolan Dep. 73:17-18.) Plaintiff's Job Description also indicates that the QAM is exempt under the Fair Labor Standards Act, and that the QAM: "Supervises: None -- dotted line to QA staff." (Fendall Decl. Ex. 5.)

Plaintiff admits to performing several of her Essential Job Functions, including, but not limited to: helping develop Defendant's new quality assurance policy and procedure manual; developing a new quality assurance scoring system; tracking QAS's production on both of Defendant's software platforms; performing QAS quality assurance audits and one client-specific audit; providing continuing education updates to QAS's; and being involved in special projects with Defendant's training department. (Nolan

Dep. 79:10-81:4, 109:22-110:12, 112:4-113:11, 117:25-118:9, 120:24-121:8; Fendall Decl. Ex. 6.) Plaintiff also acknowledges that she monitored the workflow of QAS's; provided weekly production reports documenting QAS's productivity and output; and evaluated the overall performance of QAS's, which, at times, required collaboration with the ROM. (Nolan Dep. 56:19-20, 57:10-25, 83:9-84:17.)

On December 10, 2009, Plaintiff received her only performance evaluation during the course of her employment with Defendant. (Fendall Decl. Ex. 3.) Prior to receiving her 120-day evaluation, Plaintiff was asked by Leiker to review the duties and responsibilities in her Job Description and to determine whether she had accomplished those duties. (Nolan Dep. 133:9-134:8; Fendall Decl. Ex. 6.) As a result, Plaintiff created a written self-evaluation addressing each of her Essential Job Functions. (Nolan Dep. 133:9-134:8; Fendall Decl. Ex. 6.) Plaintiff also created a "PLAN/GOAL" for each performance deficiency identified by Leiker. (Nolan Dep. 72:8-73:14; Fendall Decl. Ex. 4.) For example, Leiker indicated that:

While no one doubts [Plaintiff]'s knowledge and expertise in the field of QA, the knowledge of her job responsibilities is lacking; whether this is due to the sudden change in managers plus my being out for health reasons or just a general lack of confidence/empowerment is unknown. Hopefully this evaluation/assessment process will help with that.

(Fendall Decl. Ex. 4 at 1.) In response, Plaintiff stated:

Based on my job description, I know what my job responsibilities are. Some have been accomplished and others not, for various reasons detailed and sent to Laurie; for example, I don't see myself ever being involved with the sales team in RFPs.

PLAN/GOAL: I will reassess my responsibilities and follow

through with these.

(Fendall Decl. Ex. 4 at 1; Nolan Dep. 72:8-25) (alternative emphasis added).

On February 12, 2010, Plaintiff gave Defendant two weeks' notice that she intended to quit her job and that her final day of work would be February 26, 2010. (Fendall Decl. Ex. 11; Nolan Dep. 140:22-25.) Prior to her resignation, Plaintiff accepted an offer to become the QAM at AssistMed, Inc. ("AssistMed"), another healthcare documentation company, and began her employment in March 2010. (Nolan Dep. 12:11-13:2.) As AssistMed's QAM, Plaintiff is an exempt employee and is paid a salary of \$43,000 annually. (Nolan Dep. 13:4-17.) Plaintiff's duties at AssistMed include maintaining quality standards for the company, auditing and editing, maintaining work flow, and doing quality checks on accounts. (Nolan Dep. 14:11-17, 15:13-18.) Plaintiff also supervises employees, which entails, "[s]cheduling, just basic supervision, making sure their quality is where it needs to be. Making sure that people are working where they need to be working." (Nolan Dep. 14:11-22.)

Legal Standard

Summary judgment is appropriate "if pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Summary judgment is not proper if factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477

1 U.S. 317, 323 (1986). If the moving party shows the absence of a
2 genuine issue of material fact, the nonmoving party must go beyond
3 the pleadings and identify facts which show a genuine issue for
4 trial. *Id.* at 324. A nonmoving party cannot defeat summary
5 judgment by relying on the allegations in the complaint, or with
6 unsupported conjecture or conclusory statements. *Hernandez v.*
7 *Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus,
8 summary judgment should be entered against "a party who fails to
9 make a showing sufficient to establish the existence of an element
10 essential to that party's case, and on which that party will bear
11 the burden of proof at trial." *Celotex*, 477 U.S. at 322.

12 The court must view the evidence in the light most favorable
13 to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d
14 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the
15 existence of a genuine issue of fact should be resolved against the
16 moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).
17 Where different ultimate inferences may be drawn, summary judgment
18 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d
19 136, 140 (9th Cir. 1981).

20 However, deference to the nonmoving party has limits. The
21 nonmoving party must set forth "specific facts showing a genuine
22 issue for trial." FED. R. CIV. P. 56(e). The "mere existence of
23 a scintilla of evidence in support of plaintiff's positions [is]
24 insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252
25 (1986). Therefore, where "the record taken as a whole could not
26 lead a rational trier of fact to find for the nonmoving party,
27 there is no genuine issue for trial." *Matsushita Elec. Indus. Co.,*
28 *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal

quotation marks omitted).

Discussion

I. Evidentiary Objections

Defendant objects to several paragraphs contained Plaintiff's declaration. First, Defendant objects to Plaintiff's statements that after June 1, 2009, plaintiff's actual job duties "did not match the job duties that she was suppose to have had per her job description" (Pl.'s Resp. Def.'s Mot. Summ. J. ("Pl's Resp.") at 5) (citing Nolan Decl. ¶ 9), and that she "no longer had many of the other job duties that she had previously with Defendant." (Pl.'s Resp. at 4) (citing Nolan Decl. ¶ 8.)

Defendant claims that these statements directly contradict Plaintiff's testimony that as of late December 2009, she understood she was expected to perform all of the job duties outlined in her job description. (Def.'s Reply at 4.) Plaintiff has provided the following testimony on this issue:

Q. This is Exhibit 4. Have you ever seen this?

A. Yes.

Q. What is it?

A. These are my comments in response to my performance evaluation.

Q. That you made?

A. Yes.

Q. When did you write these?

A. Probably that same week, let's see, the week of the tenth.

Q. Tenth?

A. December 10.

1 Q. December 2009?

2 A. Yes.

3 ***

4 Q. And you were criticized for not having knowledge of
5 your job responsibilities, or lacking knowledge of
6 your job responsibilities, is that correct?

6 A. Yes.

7 Q. And your response was, "based on my job description
8 I know what my job responsibilities are." Is that-

9 A. Yes.

10 Q. And that was an accurate statement?

11 A. Yes.

12 ***

13 A. My knowledge of job responsibilities was not lacking.

14 ***

15 A. I knew what my job responsibilities were.

16 (Nolan Dep. 72:8-14, 72:21-73:2, 73:5-18, 76:18-19, 76:25)
17 (emphasis added). Plaintiff also claimed she did, in fact, perform
18 a majority of her Essential Job Functions. (Fendall Decl. Ex. 6;
19 Nolan Dep. 109:7-12, 133:9-134:3, 49:2-18, 95:14-19, 98:22-99:8.)

20 The Ninth Circuit's general rule is that

21 a party cannot create an issue of fact by an affidavit
22 contradicting his prior deposition testimony. "If a party
23 who has been examined at length on deposition could raise
24 an issue of fact simply by submitting an affidavit
25 contradicting his own prior testimony, this would greatly
26 diminish the utility of summary judgment as a procedure
27 for screening out sham issues of fact.

28 *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)
(internal citations omitted) (quoting *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1267 (1986)). This rule is concerned with "'sham'

1 testimony that flatly contradicts earlier testimony in an attempt
2 to 'create' an issue of fact and avoid summary judgment." *Kennedy*,
3 952 F.2d at 267.

4 I will therefore strike the cited portion of Plaintiff's
5 declaration claiming her job duties "did not match the job duties
6 that she was suppose to have had per her job description." (Nolan
7 Decl. ¶ 9.) Paragraph 8 of Plaintiff's declaration, which claims
8 she "no longer had many of the other job duties that she had
9 previously with Defendant," will only be stricken, in part, because
10 I am not persuaded that this statement, in its entirety, "flatly
11 contradicts earlier testimony in an attempt to 'create' an issue of
12 fact and avoid summary judgment." *Kennedy*, 952 F.2d at 267.

13 Plaintiff specifically claims she was deprived of the ability
14 to schedule random audits. (Nolan Decl. ¶ 8.) This allegation
15 does not explicitly contradict any portion of her deposition
16 testimony, nor does it seem to preclude the possibility that she
17 could have taken the initiative to "[c]oordinate[] and
18 administer[]" random audits in accordance with her Essential Job
19 Functions.⁴ Next, Plaintiff claims her duties no longer consisted
20 of "personnel issues." (Nolan Decl. ¶ 8.) Such a claim is
21 extremely ambiguous and, without further clarification, it would be
22 nearly impossible to determine whether Plaintiff was flatly
23 contradicting her deposition. Accordingly, these two portions of
24 Plaintiff's declaration will not be stricken.

25 Plaintiff also claims she no longer participated in "phone
26

27 ⁴ Perhaps, Defendant preferred that Plaintiff coordinate
28 rather than schedule random audits in order to ensure that she
received approval from her supervisor.

1 *meetings with the operations team*" after June 1, 2009. (Nolan
 2 Decl. ¶ 8.) This cannot be reconciled with Plaintiff's deposition
 3 testimony. After discussing "*monthly calls*" with the "*QA team*,"
 4 Plaintiff said "I had an agenda picked out for the third meeting,
 5 and when I . . . told [Leiker] this is what we are going to do, she
 6 said, no. I have another agenda." (Nolan Dep. 94:17-95:13.)
 7 Plaintiff responded to Leiker's December 2009 evaluation by
 8 stating: "*Next month's agenda will include a PowerPoint . . . I*
 9 *will be taking charge of all meetings going forward.*" (Nolan Dep.
 10 72:8-14, 72:21-73:2, 99:3-8.) Surprisingly, Plaintiff's
 11 declaration references the aforementioned events and notes that
 12 Leiker became Plaintiff's supervisor in September 2009, three
 13 months after she supposedly no longer participated in phone
 14 meetings with the operations team. (Nolan Decl. ¶ 11.) The cited
 15 portion of Plaintiff's declaration is stricken.⁵

16 Lastly, Plaintiff alleges that, after June 1, 2009, she no
 17 longer helped "*update Defendant's quality standards and manuals.*"
 18 (Nolan Decl. ¶ 8.) In the December 2009 evaluation, Leiker
 19 indicated that, [b]eing able to prioritize appropriately seems to
 20 be an issue . . . working on the *TTG has appeared on Deb's PITAs*,
 21 but as this is something that can be done at any time, it should
 22 take a back seat to other, more pressing issues, such as back
 23 audits of the QA team." (Nolan Dep. 81:13-21, 82:3-16, 71:2-4,
 24 74:8-12; Fendall Decl. Ex. 3-4.) Plaintiff was asked:

25
 26 ⁵ Although Plaintiff characterizes it as the "*operations*
 27 *team*," a key word search of the motion for summary judgment
 28 documents and corresponding exhibits show that the only calls
 involving a team were the QA team calls discussed in Plaintiff's
 deposition testimony.

1 Q. What is PITA?

2 A. It was a weekly report that we needed to send to
3 Laurie Leiker, and basically it was just a weekly
4 log of everything that we had done throughout the
5 week.

6 Q. When did you start having to do those PITAs?

7 A. I actually started doing those with Susan Lucci
8 before she left.

9 Q. Do you remember approximately when?

10 A. Probably was maybe June, July.

11 (Nolan Dep. 78:8-17.)

12 Q. What is the TTG?

13 A. That was the Transcend Transcription Guidelines. It
14 was a document, basically a document of procedures.

15 Q. Procedures for what?

16 A. For transcription and [Quality Assurance].

17 Q. And working on that is something that you did as the QA
18 manager?

19 A. They needed some updating[.]

20 (Nolan Dep. 81:5-13.)

21 Based on this testimony, I will strike the portion of
22 paragraph 8 of Plaintiff's declaration that pertains to updating
23 Defendant's quality standards and manuals.

24 Second, Defendant cites paragraphs 6 and 7 of Plaintiff's
25 declaration as conflicting with Plaintiff's deposition testimony.
26 Paragraphs 6 and 7, claim that, after June 1, 2009, Plaintiff "no
27 longer supervised or managed any other employees of Defendant" and
28 that the ROM's were left to "supervise and manage all aspects of
the work performed by the MLS and QAS employees," and that
Plaintiff "no longer had any direct interaction with the MLS or QAS

1 employees, and had very little communication thereafter with the
2 ROM's either."

3 I deny the motion to strike paragraphs 6 and 7 of Plaintiff's
4 declaration as moot because, as discussed further below, I have
5 determined that the administrative exemption is applicable and, as
6 appropriately recognized in *Dinicola v. State*, 2011 WL 5391657 (Or.
7 Ct. App. Nov. 9, 2011), "Plaintiff's supervision of other
8 employees . . . is not necessarily relevant to, and is certainly
9 not determinative under, the [short] duties analysis of an
10 administrative employee required by the Department of Labor's
11 regulations." *Id.* at *10. Additionally, Plaintiff's claim that she
12 did not have "direct" interaction with the MLS or QAS can be
13 reconciled with her deposition testimony. Plaintiff understood her
14 "dotted line" authority to mean that "in a roundabout way I would
15 have access to the QA specialists," who oversaw the MLS's, "but I
16 would not have the *direct* reports." (Nolan Dep. 41:18-42:5.) And
17 in any event, whether Plaintiff's interactions with MLS's and QAS's
18 was direct or indirect was not to relevant to my analysis. Nor was
19 the frequency with which Plaintiff communicated with ROM's.

20 Third, Defendant cites paragraphs 9 and 10 of Plaintiff's
21 declaration as conflicting with her deposition testimony.
22 Specifically, Defendant objects to Plaintiff's statements that,
23 after June 1, 2009, her job duties were primarily to perform "data-
24 entry work, such as daily and weekly production reports" and that
25 the "vast majority" of her work hours were spent performing
26 "clerical production work and non-exempt basic QAS transcription
27 work."
28

1 **II. Overtime Wage Claims**

2 This is an action brought pursuant to the Fair Labor Standards
 3 Act ("FLSA" or "the Act") and the Oregon wage and hour statutes,
 4 which require employers to pay overtime compensation to employees
 5 who work more than forty hours in a work week. 29 U.S.C. §
 6 207(a)(1); OR. REV. STAT. § 653.261(1). Both FLSA and Oregon law
 7 exempt "bona fide executive, administrative, or professional"
 8 employees from coverage. 29 U.S.C. § 213(a)(1); OR. REV. STAT. §
 9 653.020(3). It is Defendant's position that Plaintiff "fell within
 10 both the administrative and executive exemptions to the FLSA and
 11 Oregon's overtime requirements." (Def.'s Mem. at 8.)

12 **A. FLSA Claim**

13 Exemptions to the FLSA are narrowly construed, and the
 14 employer bears the burden of proving that the employee fits
 15 "plainly and unmistakably" within the exemption's terms. *Serv.*
 16 *Employees Inter. Union, Local 102 v. County of San Diego*, 60 F.3d
 17 1346, 1350 (9th Cir. 1994), *cert. denied*, 516 U.S. 1072 (1996). The
 18 Act delegates broad authority to the Secretary of Labor to define
 19 and delimit the scope of the administrative exemption; therefore,
 20 the Secretary has formulated the "short duties test," to determine
 21 whether employees who earn at least \$455 per week, such as
 22 Plaintiff,⁶ qualify for the administrative exemption. *In re*
 23 *Farmers Ins. Exch.*, 481 F.3d 1119, 1127 (9th Cir. 2007).
 24 Specifically, the employee's "primary duty" must (1) consist of

26 ⁶ While employed by Defendant, Plaintiff received an annual
 27 salary of \$41,976.00, or "approximately \$807.00 per week[.]"
 28 (Def.'s Mem. at 9.) It is thus evident that the salary-basis test
 is satisfied, and Plaintiff does not argue otherwise.

1 "the performance of office or non-manual work directly related to
2 the management or general business operations of the employer or
3 the employer's customers;" and (2) "include[] the exercise of
4 discretion and independent judgment with respect to matters of
5 significance." 29 C.F.R. § 541.200(a) (2004).

6 The term "primary duty" is defined as "the principal, main,
7 major or most important duty that the employee performs," and is
8 determined by assessing "the facts in a particular case, with the
9 major emphasis on the character of the employee's job as a whole."
10 29 C.F.R. § 541.700(a) (2004). Relevant factors to consider
11 include "the relative importance of the exempt duties as compared
12 with other types of duties" and "the amount of time spent
13 performing exempt work[,]" but time alone should not guide the
14 court's inquiry because there is no requirement "that exempt
15 employees spend more than 50 percent of their time performing
16 exempt work." 29 C.F.R. § 541.700 (a)-(b).

17 **1. The Short Duties Test**

18 **a. Prong One**

19 As to the first prong of the short duties test, which
20 Plaintiff's counsel did not contest, Defendant argues that
21 Plaintiff's duties as QAM unquestionably consisted of non-manual
22 work related to their general business operations. (Def.'s Mem. at
23 10.) According to Defendant, "Plaintiff was responsible for
24 ensuring that MLS's created accurate transcriptions and that its
25 QAS's were able to correct errors or omissions, so that the product
26 provided to the company met industry quality standards and was the
27 highest quality possible." (Def.'s Mem. at 10.) Defendant is a
28

1 medical transcription company and, as Plaintiff concedes, the
2 quality of the transcription is the single most important factor in
3 transcribing medical records.

4 Under the first prong, "an employee must perform work directly
5 related to assisting with the running or servicing of the business,
6 as distinguished, for example, from working on a manufacturing
7 production line or selling a product in a retail or service
8 establishment." 29 C.F.R. § 541.201(a) (2004). Such work
9 includes, but is not limited to:

10 [W]ork in functional areas such as tax; finance;
11 accounting; budgeting; **auditing**; insurance; **quality**
12 **control**; purchasing; procurement; advertising; marketing;
13 research; safety and health; personnel management; human
14 resources; employee benefits; labor relations; public
15 relations, government relations; computer network,
16 internet and database administration; legal and
17 regulatory compliance; and similar activities.

18 29 C.F.R. § 541.201(b) (2004) (emphasis added).

19 Here the record leave no question of fact regarding whether
20 Plaintiff performed work directly related to assisting with the
21 running or servicing of Defendant's business because Plaintiff's
22 duties dealt primarily with quality control and auditing,
23 functional areas which are independent upon one another in the
24 medical transcription industry. As Plaintiff acknowledged in her
25 testimony, she "needed to do audits of the individual QA
26 specialists . . . to ensure their quality was where it needed to
27 be." (Nolan Dep. 80:4-6.) Plaintiff also admitted that she
28 "tracks and trends, regular QA staff audits to ensure quality,
competencies," which was one of her Essential Job Functions.
(Nolan Dep. 112:24-113-11.) Moreover, Plaintiff was in charge of
overseeing a biannual client-specific audit that she described as

1 a "very, very extensive, intensive, detailed audit[.]" (Nolan Dep.
2 79:10-22.)

3 In short, § 541.201(b), in combination with Plaintiff's
4 admission that quality is the single most important factor in
5 transcribing medical records, demonstrates that the first prong of
6 the short duties test is met.

7 **b. Prong Two**

8 Plaintiff rests her case solely on disputing the second prong
9 of the short duties test. The FLSA only requires that an
10 employee's primary duty "includes the exercise of discretion and
11 independent judgment with respect to matters of significance." 29
12 C.F.R. 541.200(a)(3) (2004) (emphasis added).

13 Relying on 29 C.F.R. § 541.202(c),⁷ Plaintiff first claims the
14 administrative exemption is inapplicable because the employee's
15 "discretion and independent judgment" must "be free from immediate
16 direction or supervision." (Pl's Resp. at 9.) This argument lacks
17 merit. Under the federal regulations, "employees can exercise
18 discretion and independent judgment even if their decisions or
19 recommendations are reviewed at a higher level. *Thus, the term*
20 *'discretion and independent judgment' does not require that the*
21 *decisions made by an employee have a finality that goes with*
22 *unlimited authority and a complete absence of review.*" 29 C.F.R.
23 § 541.202(c) (2004) (emphasis added).

24 Next, Plaintiff argues that second prong is not met because
25

26 ⁷ The court assumes that Plaintiff's counsel was referencing
27 Title 29 of the Code of Federal Regulations, despite using the
28 abbreviation for the United States Code.

1 "employees who merely apply their skills in following prescribed
 2 procedures for determining whether specified standards are met,"
 3 and who do not exercise discretion as to matters of significance,
 4 fail to meet this requirement. (Pl.'s Resp. at 9-10.)

5 It is true that "[t]he exercise of discretion and independent
 6 judgment must be more than the use of skill in applying
 7 well-established techniques, procedures or specific standards
 8 described in manuals or other sources." 29 C.F.R. 541.202(f)
 9 (2004).⁸ The only "manual or other source" at issue in this case
 10 would be Transcend's Quality Assurance/Document Completion Policy
 11 and Program ("the QA Policy") and Transcend's Transcription
 12 Guidelines ("TTG"), which Plaintiff helped to develop and update,
 13 respectively. (DonFrancesco Decl. ¶¶ 2-3.)

14 In regards to the QA Policy, Plaintiff has stated, "[a]long
 15 with Karin Uhrich, Val Hoflack, and Susan Lucci, I helped to
 16 develop the new Transcend QA policy and procedure manual." (Fendall
 17 Decl. Ex. 6). Plaintiff's testimony sheds light on the QA Policy's
 18 use:

19 A. It was [] a document that was given to clients when
 20 a request for proposal was done. And so it was not
 21 only a company manual, but also something that the
 22 sales team used. And I think I said before that I
 worked on those with Susan Lucci, and it was team
 of people right when we were first purchased by
 Transcend.

23 Q. And so the [QA Policy] would describe for the
 24

25 ⁸ In addition, the "use of manuals, guidelines or other
 26 established procedures containing or relating to highly technical,
 27 scientific, legal, financial or other similarly complex matters
 28 that can be understood or interpreted only by those with advanced
 or specialized knowledge or skills *does not preclude exemption*."
 29 C.F.R. § 541.704 (emphasis added).

1 client what you do to ensure accuracy of the
2 transcription, is that accurate?

3 A. Yes.

4 Q. And [the QA Policy] also internally described how
5 medical transcriptionists and QA specialists should
6 perform their duties, is that accurate?

7 A. Yes.

8 (Nolan Dep. 103:3-18). As to the TTG, Plaintiff provided the
9 following testimony:

10 Q. What is the TTG?

11 A. That was the Transcend Transcription Guidelines. It
12 was a document, basically a document of procedures.

13 Q. And working on [the TTG] is something that you did
14 as the QA Manager?

15 A. They needed some updating and they needed to be
16 improved to assist our QA specialists and our
17 MT[S']s with their day-to-day work.

18 (Nolan Dep. 81:5-8, 81:11-15.)

19 Clearly, Plaintiff's relation to, and usage of, the TTG and QA
20 Policy was not limited to applying well-established techniques,
21 procedures or specific standards described in a manual. In fact,
22 Plaintiff did not mindlessly follow the TTG or QA policy's
23 mandates, she contributed materially to their development and
24 contents in order to aid the QAS's and MLS's.

25 I also disagree with Plaintiff that she did not exercise
26 discretion as to "matters of significance," which "refers to the
27 level of importance or consequence of the work performed." 29
28 C.F.R. § 541.202(a). It is undisputed that quality control, which
involved auditing, was vital to Defendant's day-to-day operation
and success.

Turning to whether Plaintiff exercised "discretion and

1 independent judgment," the court is guided by, but not limited to,
2 factors such as whether the employee: (1) "has authority to
3 formulate, affect, interpret, or implement . . . operating
4 practices;" (2) "carries out major assignments in conducting the
5 operations of the business;" (3) "performs work that affects
6 business operations to a substantial degree, even if the employee's
7 assignments are related to operation of a particular segment of the
8 business;" (4) "has authority to waive or deviate from established
9 policies and procedures without prior approval;" or (5)
10 "investigates and resolves matters of significance on behalf of
11 management[.]" 29 C.F.R. § 541.202(b).

12 Several of § 541.202(b)'s factors are present on the record.
13 For example, with respect to the first factor, "[P]laintiff
14 developed Transcend's quality guidelines and procedures; updated
15 and improve the [TTG]; developed and created a new QA production
16 log and system; and developed testing procedure for new QAS hires."
17 (Def.'s Mem. at 14.) With respect to the second and third factors,
18 Plaintiff "coordinated and monitored Transcend's quality assurance
19 audit process; performed training reviews of new MLS hires;
20 monitored and evaluated the performance and productivity of
21 Transcend's QAS team; provided continuing education and training
22 opportunities; and identified quality issues that needed to be
23 addressed." (Def.'s Mem. at 15.)

24 Accordingly because the FLSA administrative exemption is
25 applicable, Defendant's are entitled to summary judgment as to
26 Plaintiff's federal overtime wage claim.

27 ///

1 **B. State Law Claim**

2 In *Dinicola*, the Oregon Court of Appeals recognized that the
 3 Commissioner of the Bureau of Labor and Industries expanded the
 4 statutory definition of administrative employee "in ways that are
 5 consistent with the rules under the FLSA." *Id.* at *11.
 6 Accordingly, as in *Dinicola*, I reach the same conclusion as under
 7 the FLSA and hold that Plaintiff was an exempt administrative
 8 employee under Oregon law. *Id.*

9 **III. Bonus Wage Claim**

10 Plaintiff has brought a claim "for failure to pay all bonus
 11 wages in a timely manner following termination of employment,
 12 pursuant to ORS 652.150. (Compl. ¶ 8.) Defendant agrees that,
 13 under ORS 653.055, "[a]ny employer who pays an employee less than
 14 the wage to which the employee is entitled," is liable to the
 15 employee. (Def.'s Reply at 19) (emphasis in the original).
 16 Defendant claims Plaintiff was not entitled to a 2009 performance
 17 bonus because the award of such a bonus was a discretionary matter.

18 Without citing any case law, Plaintiff argues that "bonus
 19 wages were not discretionary [sic], but promised to her as part of
 20 her wage package. Therefore, a duty of good-faith and fair dealing
 21 applies to Defendant's duty to pay that bonus. A genuine issue of
 22 fact exists as to whether that duty was met." (Pl.'s Resp. at 10.)
 23 The crux of Plaintiff's position, as confirmed by counsel during
 24 oral argument, is that Defendant never established her individual
 25 performance metrics, thereby precluding the possibility that she
 26 could qualify for a bonus.

27 Defendant relies solely upon *Shahriary v. Teledesic LLC*, 60
 28

1 Fed. Appx. 157 (9th Cir. 2003). There, the plaintiff-employee had
2 received "every bit of compensation promised to him pursuant to his
3 employment contract, with the exception of a year-end bonus." *Id.*
4 at 162. The employment offer indicated he would "be eligible to
5 receive an annual bonus in the discretion" of his employer. *Id.*
6 Bonus eligibility was based, as here, on the company's success and
7 individual performance objectives that were to be mutually
8 determined. *Id.* Applying Washington state law, the Court of
9 Appeals "agree[d] with the district court that under the terms of
10 their agreement, [the employer] had no obligation to award [] a
11 bonus." *Id.* Its failure to do so, therefore, did not give rise to
12 any recoverable damages, as required to establish a claim for
13 breach of the covenant of good faith and fair dealing. *Id.*

14 I find Defendant's reliance on *Shahriary* unavailing. In
15 Oregon, "when an employment contract vests an employer with
16 discretion [regarding conferral of] a particular employment
17 benefit, the discretion must be exercised in good faith. Stated
18 differently, even if the employer's discretion extends to denying
19 the benefits, its decision to do so must be made in good faith."
20 *Furrer v. Sw. Or. Cmty. Coll.*, 196 Or. Ap.. 374, 381 (2004). There
21 is nothing on the record, however, indicating how, or if, Defendant
22 actually evaluated Plaintiff's bonus eligibility, making it
23 impossible to evaluate whether Defendant acted "in an objectively
24 reasonable manner in the performance and enforcement of their
25 contract." *U.S. Nat'l Bank of Or. v. Boge*, 311 Or. 550, 556
26 (1991).

27 Moreover, in *Walker v. Am. Optical Corp.*, 265 Or. 327 (1973),
28

1 the Oregon Supreme Court held that a "bonus plan offered by the
2 employer normally becomes binding as unilateral contract when the
3 employee begins performance of the terms of the proposed plan, in
4 the sense that the plan cannot then be revoked by the employer."
5 *Id.* "It does not follow, however, that the employee thereupon
6 becomes entitled to the bonus payment" when "the bonus plan
7 specifically provided that the bonus" was subject to a condition
8 precedent and the employee failed to satisfy its terms. *Id.* at
9 330-31. That is to say, the employer is not obligated to pay the
10 bonus until the employee satisfied all conditions precedent, *i.e.*,
11 when the employee's rights vest. *State ex. rel. Roberts v. Pub.*
12 *Fin. Co.*, 294 Or. 713. 718 (1983).

13 Here, the requisite time period required for Plaintiff's 2009
14 rights to vest was met, and there were two conditions that needed
15 to be satisfied in order to be eligible for a bonus at that time,
16 satisfactory company performance and exceeding Plaintiff's
17 individual performance metrics. Neither party has presented
18 evidence concerning how Defendant's performance was evaluated in
19 2009 for the purposes of issuing bonuses, however. Nor has it been
20 demonstrated that Plaintiff failed to meet her 2009 performance
21 metrics because, based on this record, it appears they were never
22 established. According to the July 23, 2009 job offer Plaintiff
23 accepted, the parties were to "jointly develop" the metric. It is
24 not clear whether the failure to establish the metric was due to
25 the neglect of the Plaintiff or Defendant.

26 In short, viewing the evidence in the light most favorable to
27 the nonmoving party, Defendant has failed to demonstrate the
28

1 absence of a genuine issue of material fact as to Plaintiff's bonus
2 wage claim.

3 Defendant had moved to strike Plaintiff's statement that
4 "[e]ach of the other employees that did receive a bonus were
5 apparently graded on what percentage of their performance
6 metrics/goals had been met." (Pl.'s Resp. at 9; Nolan Decl. ¶
7 16.) Because I deny the motion for other reasons stated above and
8 this argument by Plaintiff played no part in that ruling, I do not
9 rule on Defendant's motion to strike this testimony as it is moot.
10 However, in the interest of providing some insight for trial
11 preparation on this issue I note that no explanation has been
12 provided as to whether Plaintiff's co-workers, who may have
13 received an annual bonus based on an individual performance metric,
14 are appropriate comparators, *i.e.*, whether Plaintiff's co-workers
15 had any responsibility in developing their performance metrics, nor
16 whether they in fact did participate in their development. In
17 addition, the potential relevance of that inquiry is attenuated by
18 the need to examine whether those employees met their objectives
19 and whether Plaintiff would have met her undeveloped objectives. It
20 is also not clear whether Plaintiff's reference to other employees
21 includes exempt and/or non-exempt employees among many other
22 details.

23 **III. Straight-Time Claim**

24 Although Plaintiff's counsel made no reference to this fact in
25 his response to Defendant's motion, during oral argument he
26 contested whether Defendant's motion covered all claims, as
27 purported. Plaintiff's counsel claimed that his client's regular
28

1 pay was not timely, thus entitling her a "late pay penalty" under
2 ORS 652.150.

3 Plaintiff's counsel directed the court to Paragraph 8 of the
4 Complaint, which states, "[b]ecause of Defendant's failure to pay
5 Plaintiff all earned bonus wages in a timely manner following
6 termination of employment, including the fact that Plaintiff's
7 final check was paid to Plaintiff 9 days late following her
8 [resignation] from employment, Plaintiff is entitled to a statutory
9 penalty in the amount of \$4,843.20 from Defendant, pursuant to ORS
10 652.150[.]" (Compl. ¶ 8.) Plaintiff's prayer for relief only seeks
11 the following, however:

- 12 1. For unpaid overtime wages, in the amount \$26,790.42;
- 13 2. For unpaid bonus wages, in the amount of \$3,000.00;
- 14 3. For liquidated damages, in the amount of \$26.790.42;
- 15 4. For statutory penalty wages of \$4,843.20, for failure
16 to pay all overtime wages[;]
- 17 5. For a statutory penalty of wages of \$4,843.20, for
18 failure to pay all bonus wages[; and]
- 19 6. For prejudgment interest at the legal rate of 9% annum
20 on all unpaid overtime wages and bonus wages, from the
21 dates due, until final judgment is entered.

20 (Compl. at 4.)

21 Noticeably absent from the prayer for relief is a request for
22 a statutory penalty stemming from an alleged failure to deliver
23 Plaintiff's final check in a timely manner.⁹ Plaintiff's counsel
24 claims this deficiency was due to a litigant's ability to "only get
25

26 ⁹ It is also noteworthy that Plaintiff's complaint *only*
27 alleges that, "Defendant [] wilfully, knowingly and despite demand,
28 failed to pay Plaintiff's earned overtime wages" and earned bonus
wages. (Compl. ¶¶ 4-5.)

1 the penalty once," and since the "two penalties overlap, [] the
 2 nine days for the late pay[] would be included in the full 30 days
 3 pay. *So we're only asking for the 30 days pay once.*" (Hr'g Tr.
 4 35) (emphasis added). Presumably, Plaintiff's counsel is
 5 referencing the fact that, under ORS 652.150, "an employee has but
 6 a single claim for penalty wages, the magnitude of which depends on
 7 the duration of the employer's continued failure to pay earned
 8 wages. . . . [A] new and larger penalty accrues with each day that
 9 passes, essentially superseding the smaller penalty that existed
 10 the previous day," capped out at 30-days. *Russell v. U.S. Bank*
 11 *Nat'l Ass'n*, 2011 WL 4820322, at *3 (Or. App. Oct. 12, 2011).

12 Because I denied Defendant's motion as to Plaintiff's bonus
 13 wage claim, Plaintiff still has a viable 30-day claim for penalty
 14 wages. But this penalty is tied solely to Plaintiff's bonus wage
 15 claim, as Plaintiff's counsel drafted the complaint. If
 16 Plaintiff's counsel was attempting to plead a straight-time claim,
 17 alleging that "ORS 652.140 was violated, leading to a penalty under
 18 ORS 652.150," (Hr'g Tr. 22), then the complaint should have
 19 complied with Rule 8(a)'s requirements.¹⁰ As the Ninth Circuit has
 20 recognized, "summary judgment is not a procedural second chance to
 21 flesh out inadequate pleadings." *Navajo Nation v. U.S. Forest*
 22 *Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (quoting *Wasco Prods.,*
 23 *Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 922 (9th Cir. 2006)).

24
 25 ¹⁰ Rule 8(a) provides, in pertinent part, that, "[a] pleading
 26 that states a claim for relief *must contain* . . . (2) a short and
 27 plain statement showing that the pleader is entitled to relief; and
 28 (3) *a demand for the relief sought, which may include relief in the*
alternative or different types of relief." FED. R. CIV. P. 8(a)
 (emphasis added).

1 I therefore decline to consider Plaintiff's newly-asserted
2 straight-time claim.

3 **Conclusion**

4 For the foregoing reasons, Defendant's motion [19] is GRANTED
5 in part and DENIED in part.

6 Dated this 4th day of January, 2012.

7 /s/ Dennis J. Hubel

8
9

Dennis James Hubel
Unites States Magistrate Judge